THE RIGHT OF A BELLIGERENT TO DESTROY A CAPTURED PRIZE.

A CENTURY ago the destruction of captured prizes was not uncommon. During the Revolutionary War and the War of 1812 our cruisers destroyed their prizes;[1] and at the outbreak of the War of 1812 our government ordered the destruction of captured vessels, unless in extraordinary cases that clearly warranted an exception.[2] "The commerce of the enemy," it was said, "is his most vulnerable point, and its destruction the main object. Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to send them in. A single cruiser, if ever so successful, can man but few prizes, and every prize is a serious diminution of her force; but a single cruiser destroying every captured vessel has the capacity of continuing in full vigor her destructive power, so long as her provisions and stores can be replenished either from friendly ports or from the vessels captured." These instructions would now be considered barbarous; they would never have been given if the practice of civilized nations had then been settled to the contrary.

During our Civil War it was the practice of the Confederate cruisers to destroy their prizes;[3] and at the close of the war it was proposed to proceed against Captain Semmes for damages; but in view of our former practice, the government was advised against taking such action.[4] Sentiment had so changed, however, that a justification of the acts of the Confederate cruisers was thought necessary, and it was rested upon the impossibility of taking the prizes into port for adjudication by a prize court, on account of the blockade maintained by our government. The validity of this justification seems to be admitted by some of the authorities,[5] but is rejected by others.[6]

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[1] Hall, 4th ed., 475; Woolsey, 4th ed., appendix iii, n. 13.

[2] Wheaton, 4th Eng. ed., by Atlay 506; Hall 475; Woolsey, appendix iii, n. 13.

[3] Wheaton 506; Hall 475-476; Woolsey, appendix iii, n. 13; Mountague Bernard, Neutrality of Great Britain 419.

[4] Wheaton 506.

[5] Bernard, Neutrality of Great Britain 419; Hall 475-476; Bonfils § 1415.

[6] Bluntschli, 2nd French ed., § 672; Calvo § 3031.

In a paper read before the Juridical Society in 1864,[1] Clark, the reporter of the House of Lords, says: "The first perpetration of this act occasioned a thrill of astonishment if not of horror." The reason given, — lack of home ports, — he adds, is the reason of the buccaneer. "No nation has the right to put itself into a certain condition, without being bound to take all the consequences which legitimately flow from the condition. . . . A nation that goes to war must submit to all the disadvantages necessarily consequent on its condition and circumstances. If it has no means by which it can reach its enemy's territory except by violating the territories of countries at peace with its enemy and itself, it has no right on the ground of its own profit and advantage to violate those territories."

As late as 1878, during the war with Turkey, Russia was accused of sending out fast steamers which avoided Turkish cruisers but captured and burned Turkish merchantmen; but this conduct was denounced at the time as an undeniable violation of international law.

The property of the citizens or subjects of an enemy captured at sea is in theory the property of the government of the captor.[2] The right to destroy it is a consequence of the right of property. The former owners are not interested; the fact that they are enemies deprives them of all claim to the captured vessel. In former days it was to the interest of the captors to conceal the fact of capture, seize for themselves what was readily carried away, and destroy what could not be secretly disposed of. The temptation was therefore strong to sink or burn a vessel captured at sea. On the other hand, the interest of the captor's own government in the prize required that it should be brought into port for adjudication; and it was for the protection of the government that the French Ordonnance of 1681 prohibited the sinking of captured vessels and the landing of prisoners on islands or remote coasts; but it is entirely clear that this prohibition was not dictated by any tenderness for the rights of private property or of neutrals.[3]

At the time of the Seven Years War, it became the practice of France and England to concede to the captors the rights of the

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[1] 3 Juridical Society Papers 28.

[2] The Dos Hermanos, 10 Wheat. (U. S.) 306; The Siren, 13 Wall. (U. S.) 389; The Emulous, 1 Gall. (U. S. C. C.) 569; Hall 474.

[3] Hall 476, n.; Calvo § 3031, citing Pistoye and Duverdy.

government to the prize,[1] and this practice has now become general. By the statute of the United States prior to 1899, where the prize is of superior or equal force, the net proceeds of the property condemned are to be decreed to the captors; when of inferior force, one-half is to be decreed to the United States.[2] The title does not pass to the captors until condemnation. Since the right to destroy rests upon the right of property and the right of property until condemnation is in the government of the captor, the destruction can be authorized only by the government.

The reason which formerly might be relied upon as a justification for the destruction of prizes without condemnation has not now the same force. The captors who destroy a prize before condemnation, even if it is a lawful prize, are not destroying their own property, and good policy on the part of the captor's own government requires that the prize should be brought in for adjudication, although for a different reason from that which dictated the Ordonnance of 1681. In the present state of commerce, the property of belligerents and neutrals is usually so commingled that the immediate destruction would probably involve the government in controversy with neutrals. This danger has become greater since the Declaration of Paris in 1856 established the rule that a neutral cargo was protected, even under an enemy's flag.

The rule and the reasons for it are well stated by Lord Stowell in the case of *The Felicity*.[3] The capture occurred January 1, 1814; the litigation arose after the treaty of peace between England and the United States in 1815; the case was decided in 1819. Lord Stowell said:

"Regularly a captor is bound by the law of his own country, conforming to the general law of nations, to bring in for adjudication, in order that it may be ascertained whether it be enemy's property; and that mistakes may not be committed by captors, in the eager pursuit of gain, by which injustice may be done to neutral subjects, and national quarrels produced with the foreign states to which they belong. Here is a clear American vessel and cargo, alleged by the claimants themselves to be such, and consequently the property of enemies at that time. They share no inconvenience by not being brought in for the condemnation which must have followed if it were mere American property; and the captors fully justify themselves to the law of their own country which prescribes the bringing in, by shewing that the immediate service in which they were engaged, that of watching the enemy's

[1] Hall 474 n.

[2] Rev. Stat. § 4630.

[3] The Felicity, 2 Dod. 381, at pp. 385, 386.

ship of war the President, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property."

The question of the right to destroy enemy's property without an adjudication by a competent tribunal is, as Lord Stowell clearly shows, a question between the captors and their own government.

Although the practice of destroying under any circumstances enemy's vessels captured as prize, is condemned by some publicists as "a rigorous act,"[1] as "an exceptional exercise of an extreme right,"[2] as "not fully justified in any case,"[3] as "barbarous,"[4] and is restricted by others to cases of absolute necessity, to cases of "*vis major*," or "certain necessities of war," it is a right that is even at the present day universally recognized. As Calvo[5] says: "The right of the captor remains intact in presence of circumstances of *vis major* or certain necessities of war. The only point which may give rise to some discussion, which even demands, in our opinion, a reform of international law, is a definition of these circumstances and these necessities. There is room for more severe judgment of the motives which have determined the destruction of the prize. The *vis major* or the necessity should be established beyond all doubt and all serious criticism, by proofs of a character to justify fully the conduct; in a word, it must be demonstrated that he [the captor] could not act otherwise than he acted."

Several attempts have been made to formulate rules determining in what cases the captor may destroy the prize. The whole subject was considered by a commission for the Institute of International Law between 1875 and 1882, and in the latter year at the Turin Congress the Institute adopted rules justifying the act in the following cases:[6]

1. When it is not possible to keep the ship afloat, because of its bad condition, the sea being tempestuous;

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[1] Calvo § 3028.
[2] Bluntschli § 672.
[3] Boeck, cited by Calvo.
[4] Woolsey, appendix iii, n. 13.
[5] Calvo § 3034.
[6] Hall 477, n.; Annuaire de l'Institut (1883) 221.

2. When the ship sails so badly that it cannot follow the warship, and can be easily recaptured by the enemy;

3. When the approach of a superior hostile force causes fear of recapture of the captured vessel;

4. When the ship of war cannot put on the captured vessel a sufficient crew without diminishing too much that which is necessary to its own security;

5. When the port to which it would be possible to conduct the captured ship is too remote.

Bonfils adds that there are other cases resulting from instructions or other circumstances, but leaves these circumstances undefined.[1]

These rules do not justify destruction on account of the insignificant value of the prize, as was suggested by Valin;[2] nor do they permit the fact that the captor's home ports are blockaded to excuse the act, as was urged in behalf of the Confederate cruisers, although the latter circumstance is recognized by Bonfils as a justification.

The Russian rules of 1869, article 108,[3] and of 1895, article 21,[4] are substantially the same as the rules of the Turin Conference, but they recognize the small value of the prize as a circumstance in connection with the remoteness of the ports to which it could be taken, justifying its destruction.

The destruction of a vessel belonging to a citizen of the hostile belligerent is, however, very different from the destruction of a neutral vessel. Enemy's property at sea is lawful prize, and its destruction is a question that concerns only the captor and his own government; the hostile government cannot complain. Neutral property is not ordinarily lawful prize, and the neutral government is bound to maintain the rights of its citizens. To justify even the capture of a neutral ship, facts must be established which make it lawful prize.

The circumstances which make a neutral vessel lawful prize are thus stated by one of the most recent French authorities:[5]

1. When it opposes resistance or prepares to resist visit, when summoned.

2. When the commander cannot prove his neutral character.

3. When the state of the ship or the declarations of the captain cause grave suspicions; if he has no papers aboard; if they are

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[1] Bonfils § 1415.

[2] Hall 476, n.

[3] 11 Revue de Droit International (1879) 632; Bonfils § 1415.

[4] Bonfils § 1415.

[5] Bonfils § 1674.

double, or incomplete because part have been thrown in the sea; when circumstances cause a presumption that they are simulated.

4. When the ship has deviated from her route and the captain is unable to give good reasons (*fondées et justificatives*) for the change of route, causing a suspicion that the apparent destination is false, and the cargo includes contraband of war.

5. When the ship is destined to an enemy's port, even one not blockaded, and has on board merchandise contraband of war, troops, or enemy's despatches.

6. When the ship has attempted to violate a blockade of which notice has been regularly given.

Although the fifth case stated by Bonfils justifies condemnation of a neutral vessel for carrying contraband of war to an enemy's port, it seems that the weight of authority is contrary to the view he expresses, in the case of a vessel carrying contraband merchandise.

Lord Stowell[1] says: "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles." He admits, however, that the ancient practice was otherwise, and was perfectly defensible on every principle of justice.

Wheaton[2] says: "In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated."

Justice Story[3] says: "According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation on their part in a meditated fraud upon the belligerents."

Bluntschli[4] says that "a neutral ship carrying contraband can be detained only as long as is necessary to effect the seizure of the contraband. It cannot be captured when the merchandise forms

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[1] The Neutralitet, 3 Rob. A. 295; Scott's Cases 767.

[2] Wheaton § 505, p. 678.

[3] Carrington *v.* Merchants' Insurance Co., 8 Pet. Adm. (U. S. Dist. Ct.) 495; Scott's Cases 769, 772.

[4] Bluntschli § 810.

only a small part of the cargo and may be confiscated separately. The ship can only be declared good prize when its owner has known that the ship carried contraband and authorized it."

It is recognized that where the owner of the contraband goods is also the owner of the vessel, the latter is subject to condemnation as prize.

The view expressed by Lord Stowell, Justice Story, Wheaton, and Bluntschli is certainly more consonant with modern ideas. It is unnecessarily harsh to hold that the owner of the vessel is involved in the guilt of the owner of the contraband merchandise, when he may be entirely innocent of any intent to injure the belligerent, and is probably merely pursuing his ordinary business of carrying merchandise for all who offer.

Under any view we take of what facts will make the neutral vessel lawful prize, the result depends upon inferences to be drawn from circumstances; upon whether the facts indicate good faith or bad faith toward the belligerents on the part of the neutral vessel. Even if we hold that the vessel may be condemned merely for carrying contraband, the question of whether or not the goods are contraband often depends upon the circumstances; some goods are of doubtful use and are sometimes contraband, sometimes not.

Dangerous as is the power conceded by the rules of international law to the captor to determine for himself that the prize is enemy's property, it is still more dangerous to concede to him the right to determine for himself that a neutral vessel has by misconduct made itself lawful prize. He is thereby made judge in his own cause under circumstances not calculated to lead to a fair judgment, and is put in a position to embroil his government in difficulties with the neutral governments without the compensation of doing that serious injury to the enemy which his duty to his government may, as Lord Stowell says, enjoin.

An examination of the authorities shows that although the right to destroy a neutral ship captured as a prize is perhaps not expressly denied, it is not established. The merchantmen destroyed by our cruisers during the Revolutionary War and the War of 1812 were British merchantmen; the merchantmen destroyed by the Confederate cruisers were the property of citizens of the United States; and all the cases cited in the works on international law seem to have been cases of enemy's ships. The difference between an enemy's property and a neutral's property was clearly stated by

Lord Stowell in the case already cited.[1] After referring to the duty to destroy enemy's property, he says:

"Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the captor's own State; to the neutral it can only be justified, under any such circumstances, by a full restitution in value."

The English editors of Wheaton[2] say: "If the prize is a neutral ship, no circumstances will justify her destruction before condemnation. The only proper reparation to the neutral is to pay him the full value of the property destroyed. Neutral cargoes are not always equally privileged."

Two cases of destruction of a neutral cargo in an enemy's ship arose during the War of 1870 between France and Germany. A French cruiser had captured and destroyed two German vessels, the Ludwig and the Vorwaerts. The owners of the cargo claimed that neutral goods were protected by the Declaration of Paris protecting neutral merchandise not contraband of war, even in an enemy's ship. The French court decided adversely to this claim. There can be no question of the correctness of this decision; for, as Calvo says, the Declaration of Paris declares only that neutral goods cannot be seized; to say that they cannot be seized or confiscated is very different from saying that they are inviolable. Private property on land cannot be confiscated by a belligerent, but private property, even of a neutral, is not exempt from the chances of war if injured, for example, by the bombardment of a hostile port. It would interfere with the recognized rights of a belligerent if he could not deal with an enemy's ship as he otherwise would be entitled to deal with it, simply because the exercise of his rights might necessarily injure a neutral cargo.[3] The very fact that this question could be raised and that the justification of the act of the French cruiser was rested upon the fact that the injury was a necessary incident to the destruction of the enemy's ship is an indication that the French court would, if the question had arisen, have held the view as to the immunity of a neutral ship

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[1] The Felicity, 2 Dod. 386.

[2] Wheaton § 507.

[3] Dalloz, Jurisprudence Générale (1872), Pt. iii, p. 94, cited in Wheaton 507; Calvo § 3031.

from destruction without condemnation, which had been expressed more than fifty years before by Lord Stowell. This view is strengthened by the recognition of the rights of neutrals contained in the Declaration of Paris in 1856.

It seems from this review of the authorities that Calvo is right in saying that the publicists establish a distinction with reference to the character of the vessel, and make the legality or illegality of the act of destruction depend on the hostile character or the neutrality of the property destroyed.[1] Hall defends the right of the belligerent to destroy enemy's property, but adds: "Destruction of neutral vessels or of neutral property on board an enemy's vessel would be a wholly different matter." [2]

When the rules for the regulation of maritime prizes were under discussion by the Institute of International Law at Wiesbaden in 1881, it was proposed to amend the draft then presented by limiting the right of destruction to enemy's vessels with an exceptional right to destroy a neutral ship that was liable to condemnation as good prize, and the amendment was actually adopted that year, but was stricken out at the conference at Turin the following year. The report in the "*Annuaire de l'Institut*" fails to show whether it was stricken out because of the limitation of the right to enemy's ships, or because of the recognition of the right under exceptional circumstances in the case of neutral ships.[3]

The weight of authority is in favor of the view that neutral ships ought not to be destroyed before condemnation. This also accords with the modern tendency to respect private property at sea as it is respected on land, and with reason. The right of destruction rests upon the theory that the former owner loses nothing; since the property destroyed is subject to condemnation, he has nothing to gain by proceedings before a prize court; this is so only in the case of a lawful prize. In the case of an enemy's vessel, the hostile character of the vessel makes it lawful prize, and this is a fact readily determined, about which there can be little dispute. A neutral vessel, on the other hand, is lawful prize only under exceptional circumstances, and it requires a somewhat nice judgment to determine whether or not those circumstances exist, — a judgment which, on general principles, ought not to be entrusted to her

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[1] Calvo § 3031.

[2] Hall 477, n. 762–763, citing The Zee Star, 4 Rob. A. 71; The Felicity, 2 Dod. 381; The Leucade, Spinks Pr. Ca. 221.

[3] Annuaire de l'Institut, 1881, 1882.

captor. Civilization and reason plead in favor of the neutral, and considerations of expediency on the part of belligerent governments are on the same side. The risk of unnecessary complications and even of war is so great, and the injury to the enemy so indirect, that the power of destroying neutral vessels before condemnation ought not to be entrusted to the commanders of warships.

Francis J. Swayze.